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Oct 13 1987	Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

EDITOR'S NOTE

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86-6914

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

LINDA S. MOORE,

Petitioner

v.

STATE OF GEORGIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE

COURT OF APPEALS OF GEORGIA

Supreme Court, U.S.
FILED
APR 30 1987
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QUESTIONS PRESENTED

1) Whether sentencing the Petitioner to a term of imprisonment based on two prior uncounseled misdemeanor convictions, which were constitutionally invalid because Petitioner was not advised of her rights, and did not knowingly and voluntarily waive any such rights, violates the Sixth and Fourteenth Amendments.

2) Whether the use of uncounseled misdemeanor convictions to invoke a minimum statutory sentence or to enhance a sentence of confinement violates the due process protections of the Sixth and Fourteenth Amendments.

3) Whether sentencing the Petitioner to a term of imprisonment based on two prior convictions, the validity or reliability of which, were not prove under any permissible standard of evidence violates the due process and equal protection guarantees of the Sixth and Fourteenth Amendments.

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NO. _____

IN THE

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LINDA S. MOORE,

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v.

STATE OF GEORGIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE

GEORGIA COURT OF APPEALS

Petitioner respectfully prays that a writ of certiorari issue to review the judgment entered on January 9, 1987 affirming her sentence of 90 days in jail, 21 months probation and $1,050.00 fine.

OPINIONS BELOW

The opinion of the Georgia Court of Appeals in Moore v. State, 180 Ga.App. 746 (1987) was rendered on January 9, 1987 (Appendix A). A petition for rehearing was denied on January 21, 1987 (Appendix B). The Petition For A Writ Of Certiorari to the Georgia Supreme Court was denied February 17, 1987 (Gregory, J. dissenting) (Appendix C). Motion For Reconsideration was denied on March 11, 1987 (Smith and Gregory, JJ. dissenting). (Appendix D).

JURISDICTION

Final rehearing by the Supreme Court of Georgia was denied and entered on March 11, 1987. Jurisdiction is invoked under 28 USC 1257(3) and Rule 17, Revised Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without its jurisdiction the equal protection of the laws.

O.C.G.A. §40-6-391 provides in relevant part:

(3) For the third or subsequent conviction within a five-year period of time, as measured from the dates of previous arrests for which convictions were obtained or pleas of nolo contendere were accepted to the date of the

current arrest for which a conviction is obtained or a plea of nolo contendere is accepted:

> (A) A fine of $1,000.00, which fine shall not, except as provided in subsection (g) of this Code section, be subject to suspension, stay, or probation; and
>
> (B) (i) A mandatory period of imprisonment of not less than 120 days nor more than one year. The judge, at his sole discretion and under such terms and conditions as he shall impose, may suspend, stay, or probate all but ten days of any term of imprisonment imposed under this paragraph.
>
> (ii) The judge, at his sole discretion, may suspend, stay, or probate the minimum ten-day term of imprisonment not subject to suspension, stay, or probation under division (i) of this subparagraph, provided that a condition of the suspension, stay, or probation of the minimum ten-day term of imprisonment shall be that the defendant shall perform not less than 30 days of community service.

(4) For the purpose of imposing a sentence under this subsection, a plea of nolo contendere shall constitute a conviction.

STATEMENT OF THE CASE

The Petitioner was convicted and sentenced under the provision of O.C.G.A. §40-6-391 which mandates a minimum incarceration period of ten days for defendants who have two prior D.U.I. convictions in the five year period.

As to the first prior conviction the defendant allegedly pled guilty to the offenses of driving under the influence and leaving the scene of an accident. (R-58, 59). She was sentenced to three months in confinement, twenty-one months on probation, $1,050.00 in fines, alcohol evaluation and 24 months suspension of license. (R-58).

The facts of the case show that Petitioner was arrested on July 8, at 1:30 a.m. for D.U.I., Leaving the Scene of

an Accident and Driving on a Suspended License. The crimes were committed less than twenty-four hours after personally finding her fiance who had committed suicide on July 6, 1986 at 9:50 p.m. (Sentencing-6, D-1). Petitioner was a 29 year old white female working at Sosebee's Wrecker Service. (Motion-11).

Prior to the entry of the guilty plea defendant filed a motion in limine on December 10, 1985. (R-8). The objective of the motion was to forbid the use at sentencing of evidence of any prior charges of driving under the influence. (R-8, 55). The Petitioner argued that the prior convictions were uncounseled, without a valid waiver and were otherwise invalid under the Sixth and Fourteenth Amendments of the United States Constitution and Art. I, Sec. I, Par. XIV of the 1983 Constitution of Georgia. (R-8, 55).

After an evidentiary hearing on March 28, 1986, the motion was denied on May 19, 1986. (R-56). Prior to the hearing the Petitioner filed on February 7, 1986, an amended motion for discovery and notice produce. (R-16). The Petitioner requested that the State produce a record of any prior D.U.I. convictions that it intended to rely on at sentencing. (R-16). Petitioner stated that at the time she was unable to obtain "any reliable information regarding any previous convictions for D.U.I. of this Petitioner." (R-16). At the hearing the State said it produced the only documents available regarding the two previous convictions. (M-4).

The record of the second conviction in 1985 in Rockdale County consisted of one document. (R-65) (S-1 D 1 Motion Hearing). That form was a Uniform Traffic Citation of the Rockdale County Sheriff's Department stating the arrest and charges. (R-65). The Petitioner was not represented by an attorney nor was a waiver of rights obtained. (R-M

4, 15). The Petitioner never went to court on this charge but appeared in the office before the clerk of recorders court. "Plead guilty," and received a sentence of 80 hours community service, $600.00 fine and suspension of license for 120 days. (M-15, R-59). The Petitioner never saw a judge and never signed any papers in connection with her guilty plea. (M-15, 16, 17). However, she did understand she was pleading guilty. (M-17). Although there was no factual basis for the plea in a record of Rockdale County the Petitioner stated at the hearing: "Well, I was in a rest area asleep in the truck and they knocked on the door and woke me up and charge me with D.U.I.." (M-14).

Petitioner's first conviction for D.U.I. was in Oxford, Newton County in 1981. (S-1 & D-1 Motions). The record of this consisted of a letter to the DeKalb Solicitor's Office dated February 20, 1986, stating: "This is to certify that in June of 1982 Linda Eads Moore pleaded a nc lc (sic) to a D.U.I. charge. She was fined $200.00 on case number 2455 (sic)." The letter was signed by City Clerk Jo Anne S. Jenkins and added "This is a certified copy." (D-1, S-1).

Attached to this was a copy of an entry into the Recorders Court docket book. (D-1, S-1). The entry had Linda S. Moore's name written in with "no lo" beside it. The entry further stated "On hearing the evidence the Petitioner is found (blank spaces) guilty and fined $200.00 and required to pay costs in the case and 30 days of had labor on the streets suspended upon payment of fine." The signature of the Recorder Clerk, Robert W. Allen was stamped below with the notation that "Clerk Allen granted a no lo contendere plea." (S-1, D-1). This consists of the entire record of the guilty plea.

The Petitioner never appeared in court or before a judge and never signed any papers or documents. (M-12). The "plea" was taken in the clerk's office without advice of counsel or any waiver, nor was the Petitioner ever advised of her rights. (M-14).

In the Oxford, Newton County case, the petitioner was charged with D.U.I. only, while driving a moped, an unlicensed vehicle. (S-7).

At the motion's hearing in this case the Court stated that: "The State is having to offer it in terms of an enhanced sentence." (M-7). The State responded affirmatively. (M-7). After denying the Motion In Limine, the sentencing hearing was held on May 30, 1986. (R-56). At the sentencing the Petitioner made a continuing objection to the use of the prior D.U.I.'s. (S-2).

REASONS FOR GRANTING THE WRIT

I. SENTENCING THE PETITIONER TO A TERM OF IMPRISONMENT BASED ON TWO PRIOR UNCOUNSELED MISDEMEANOR CONVICTIONS WHICH WERE ALSO CONSTITUTIONALLY INVALID BECAUSE PETITIONER WAS NOT ADVISED OF HER RIGHTS AND DID NOT KNOWINGLY AND VOLUNTARILY WAIVE ANY SUCH RIGHTS VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS.

The opinions below fail to set out any reason or authority as to why Petitioner's prior convictions were constitutionally valid. Instead the Georgia Court summarily disposes of Petitioner's contentions in this regard saying "Accordingly, consideration of Petitioner's prior conviction for driving under the influence of alcohol in determining an appropriate sentence did not violate the Sixth and Fourteenth Amendments to the Constitution of the United States." (A 3).

In the trial court the Petitioner attacked the prior "guilty pleas" on the grounds that they were not knowing and voluntary within the meaning of the Sixth and Fourteenth

Amendments. See Boykin v. Alabama, 395 U.S. 238 (1969). Once the Petitioner raises the issue of intelligent waiver with respect to prior guilty pleas, the burden is on the State to establish a valid waiver. Marshall v. Lonberger, 459 U.S. 422 (1983). Accord Pope v. State, 256 Ga. 189 (1986). Not only did the State not put on any evidence to sustain their burden of proof, the defendant, in fact, showed that the guilty pleas were not knowing and voluntary in that they were uncounseled, with no valid waiver, without factual basis, being unsigned and unsworn, not taken in open court or before any judge, nor was there a valid waiver of Petitioner's rights under the Fifth, Sixth and Fourteenth Amendments. Boykin v. Alabama, supra, 395 U.S. at 242. Absent a showing that Petitioner's previous guilty pleas were knowingly and voluntarily entered, the trial court erred by admitting them over Petitioner's objections. Marshall v. Lonberger, supra,

In Burgett v. Texas, 389 U.S. 109, 15, (1967) the Supreme Court held that the prosecution may not offer evidence of a prior uncounseled felony convictions in an effort to enhance the Petitioner's punishment in a subsequent proceeding as "the admission of a prior criminal conviction which is constitutionally infirm under the standards of Gideon v. Wainright, is inherently prejudicial." Five years later in United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589 (1972), the Court held that a prior conviction that was constitutionally invalid, under Gideon, could not be considered by the judge in sentencing a defendant. Thus unconstitutional convictions cannot be used for any purpose at sentencing.

Georgia has assimilated these constitutional principles involving guilty pleas and set them out in the Uniform Rules of Superior Courts. However, none of these standards were

met in regards to Defendant's guilty pleas.

Rules 33.7, 33.8 and 33.9 of the Uniform Rules of Superior Courts of Georgia summarize the requirements of a valid guilty plea. According to these rules the judge must determine on the record if the plea is voluntary. id. 33.7. The judge must address the Petitioner personally to determine whether any promise or any force or threats were used to obtain the plea. id. 33.7. Rule 33.8 provides that the Petitioner must be advised of all his rights and that entering a plea of guilty he in effect waives his rights. Finally, Rule 33.9 provides:

> "Notwithstanding - the acceptance of a plea of guilty, the judge should not enter a judgment upon such plea without making such inquiry on the record as was satisfy him that there is a actual basis for the pleas."

Of course these procedural rules are mandated by binding precedent of the United States Supreme Court. "The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards." Boykin v. Alabama, supra 395 U.S. at 242. "The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation." id. The reason for this is that: "Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." id. "[R]eal notice of the true nature of the charge against her (is) the first and most universal recognized requirement of due process." Smith v. O'Grady, 312 U.S. 329, 334 (1941).

Several constitutional rights are implicated in a waiver that takes place when a guilty plea is entered. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment. Malloy v. Hogan, 378 U.S. 1 (1964). Second is the right to trial by jury. Duncan

v. Louisiana, 391 U.S. 145 (1968). Third are the rights of confrontation. Pointer v. Texas, 380 U.S. 400 (1965). "We cannot presume a waiver of these three important federal rights from a silent record." Boykin v. Alabama, supra 395 U.S. at 243.

II. AN UNCOUNSELED MISDEMEANOR CONVICTION CANNOT BE USED TO INVOKE A MINIMUM STATUTORY JAIL SENTENCE OR TO ENHANCE A SENTENCE OF CONFINEMENT.

In holding that the prior uncounseled convictions can be used to enhance a sentence the Georgia Courts have overlooked and misconstrued the Sixth and Fourteenth Amendments and Baldasar v. Illinois, 446 U.S. 222, (1986). The trial court specifically held that the prior convictions were being used to enhance the sentence. (M-7).

The ruling of Baldasar is not as narrow as the Georgia Courts interpret it. Baldasar does not merely say you cannot use a prior uncounseled conviction to increase imprisonment for a subsequent conviction, or to extend a maximum term of punishment, or to convert a subsequent misdemeanor into a felony, or to impose sentence under a recidivist statute. (pg. 3 & 4 of State Brief). Baldasar does prohibit all of the above but its scope is broad and stated simply is that "prior uncounseled misdemeanor convictions could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction." id. 446 U.S. at. 226.

Thus it seems clear that the majority would hold that a prior uncounseled misdemeanor conviction could not be used collaterally to impose an increase term of imprisonment upon a subsequent conviction." id. 446 U.S. at. 226, 100 S. Ct. 1587. The right to counsel absent a knowing and intelligent waiver was recognized in Argersinger v. Hamilin, supra, 407 U.S. at 25. However, the Court confined that right to prosecutions that "end up in the actual deprivation of a person's liberty." id. 407 U.S. at 40. The question

of the right to counsel in cases in which incarceration was authorized but would not be imposed was expressly reserved, id. 407 U.S. at 37. In Scott v. Illinois, 440 U.S. 367, 373, (1979) the Court finally addressed this question and adhered strictly to Argersinger.

> "Even were the matter res nova, we believe that the central premise of Argersinger that actual imprisonment is a penalty different in kind form fines or the mere threat of imprisonment - is imminently sound and warrants the adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." id. 440 U.S. Ct. 373.

In Baldasar v. Illinois, the Court further defined the reaches of Argersinger and held that a "petitioner's, prior uncounseled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment for a subsequent conviction." id. 446 U.S. at 226, (Marshall concurring). The Court was presented with the question of whether an uncounseled misdemeanor conviction may be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term. id. 446 U.S. Ct. 222, 100 S. Ct. 1585.

The case has caused confusion because it was decided 5-4 in a per curiam opinion with three concurring opinions. In Marks v. United States, 430 U.S. 188, 193 (1977), the Court held that when no opinion in one of its decisions commands the support of the majority of justices who based their concurrence in the decision on the narrowest grounds. Justice Blackman concurred saying that invalid convictions could not be based to enhance a subsequent conviction Baldasar, supra 446 U.S. 231, 232. He defined an invalid misdemeanor conviction as a conviction obtained with out benefit of counsel with results in an actual term of imprisonment or is one at least punishable by more than six months in prison. A second concurrence, joined by Steward Brennan and Stevens,

held that it was unconstitutional under Scott v. Illinois, to sentence a defendant to an increased term of imprisonment only because he had been convicted in a previous prosecution in which he had not had the assistance of appointed counsel in his defense. Baldasar, supra 446 U.S. Ct. 224. A third concurrence joined by Marshall, Brennan and Stevens held that "petitioner's prior uncounseled misdemeanor convictions could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction because "a rule that held a conviction involved for imposing a prison term directly, but valid for imposing a prison term collaterally, would be an illogical and unworkable deviation from out previous cases." id. 446 U.S. Ct. 226, 228.

Other Federal and State Courts have precluded the use of convictions obtained without counsel to enhance a subsequent sentence of imprisonment. In Santillanes v. United States Parole Commission, 754 F.2d 887 (10th Cir. 1985), that Court held that a parole revocation proceeding cannot make use of a prior constitutionally infirm (uncounseled) D.U.I. conviction to support guilt or enhance punishment. Similarly prior uncounseled misdemeanor convictions cannot be used to enhance imprisonment under parole guidelines. Addvesky v. Gunnell, 605 F.Supp. 334, 335 (D. Conn. 1983). Probation may not be revoked on the basis of a misdemeanor conviction obtained without counsel or valid waiver. Hollingsworth v. State, 410 So. 2d 133 (Ala. App. Ct. 1981). Most recently the North Dakota Supreme Court addressed the punishment enhancement aspect of a statute that is identical to O.C.G.A. §40-6-391 in that it increases punishment for repeat offenders simply because a second, third or fourth offense is considered a more serious offense. State v. Orr, 38 Cr. L. 2098 (N.D. Sup. Ct. No. 1073, 10/1/85). That court thus held that

a conviction obtained without a valid waiver of counsel could not be used to enhance a term of imprisonment for a subsequent offense.

However, other jurisdictions have held that uncounseled misdemeanor convictions can be used as a basis for computing a prison sentence for a subsequent conviction. Schindler v. Clerk of Circuit Court, 715 F. 2d 341 (7th Cir. 1983); Schuttel v. Clerk of Circuit Court, 575 F. Supp. 1199 (E.D. Wis. 1983); State v. Novak, 318 N.W. 2d 364 (Wis. 1982).

Case law in Georgia is also in conflict. Some Georgia case law actually supports Baldasar. In Hopper v. Thompson, 232 Ga. 418 (1974), the sentence was set aside solely because the sentencing court used four prior uncounseled felonies, introduced by the State in aggravation of punishment under O.C.G.A. §17-10-1 (Ga. Code Ann. 27-2534), to impose a 15-year sentence for burglary. "This court has previously held that where illegal evidence of prior convictions is admitted at the pre-sentence stage, the sentence is void." id. at 419. Most recently in Swinney v. City of Atlanta, 176 Ga.App. 823 (1985), the court reversed a misdemeanor conviction for leaving the scene of an accident "due to the absence of any showing in the record that he waived his right to counsel." id. at 824. Contrary to the State's position, the court in Swinney did not predicate its ruling upon whether the defendant's conviction resulted in imprisonment. The Court strictly adhered to Argersinger v. Hamlin, supra, and quoted from Jones v. Wharton, 253 Ga. 82, 83 (1984), holding that: "When an accused is placed on trial for any offense, whether felony or misdemeanor, for which he faces imprisonment, the constitutional guarantee of right to counsel attaches." Swinney, supra, at 824. See also Harrison v. State, 136 Ga.App. 71 (1975) which held that it was error

at sentences to admit evidence of an earlier conviction without proof that the prior conviction was valid.

The other Georgia cases relied on by the State are in conflict with Baldasar, Argersinger, and Townsend. Robinson v. State, 173 Ga.App. 285 (1985) dealt with the court's consideration of prior arrests in determining whether to accept a nolo plea in a D.U.I. case. Since a decision to accept a plea of nolo contender "shall be at the sole discretion of the judge," the court held this was not improper. Although Stilwell v. State, 161 Ga.App. 230 (1982) seemingly addresses the issue presented in Baldasar, the court decidedly skirted the issue and distinguished Baldasar. In Stilwell the defendant was sentenced to twelve months to do three for attempted shoplifting after the State produce three prior convictions for shoplifting. Firstly, the Stilwell court held that there was valid waiver of counsel obtained in all three of the prior shoplifting charges. Secondly, the court held that repeat offender provisions of O.C.G.A. §16-8-12 (Ga. Code Ann. 26-1802.1), the shoplifting statute, were not applicable to a conviction for criminal attempt. id. at 232. Thirdly, the court found that the three prior convictions were not used to increase a term of imprisonment but were considered only "for the purpose of deciding whether to stay, suspend, or probate all or some of the sentences imposed in the case." id. at 232.

The decision in Smith v. State, 248 Ga. 828 (1982) is simply not applicable here as it dealt with the habitual violator statute O.C.G.A. §40-5-58. The court simply held that the validity of prior misdemeanor convictions leading to habitual violator status were not subject to attack on collateral grounds because "the offense of . . . driving a motor vehicle after revocation of a license upon being

declared a habitual violator is an offense separate and district from the offenses which led to the driver's being declared a habitual violator." id. at 830. However, in People v. Rocha, 650 P. 2d 569 (Colo. Sup. Ct. 1982), that court reached the opposite result holding that the habitual violator status cannot be predicated on invalid misdemeanor convictions, citing Baldasar, supra.

The State argues that applying Baldsar "would hamstring the courts and smaller communities of the State," a concern expressed by the Court of Appeals of Georgia at oral argument. There is no basis to deny constituted rights solely on an economic basis. However, this argument has been addressed by the United States Supreme Court:

> The economic effect of our decision today will be minuscule to that of Powell v. Alabama, Gideon v. Wainwright, Argersinger v. Hamilin. But whatever that cost may be, it cannot out weight the Sixth Amendment command that no one may be imprisoned as a result of a conviction is which he was denied the assistance of counsel. Baldasar, supra, 446 U.S. Ct. 230, 100 S. Ct. 1589. (Blackman concurring) (citations omitted)

And as pointed out in Baldasar, 4460 S. Ct. 227, 100 S. Ct. at 1588 (Marshall, Brennan and Stevens concurring);

> Further, not all subsequent offenses are subject to enhancement, and not all previous offenses are predicate offenses for enhancement purposes. Thus the number of cases in which the State must decide whether to provide counsel solely to preserve its ability to enhance a subsequent offense will be only a fraction of the total. In many of those remaining cases, the judgment whether future misconduct is likely, and whether the first offense is serious enough to warrant its use for enhancement, will be relatively a easy exercise of prosecutorial description.

Moreover, as pointed out in Baldasar, misdemeanor convictions may actually be less reliable than felony convictions and jurors may be less scrupulous about applying the reasonable doubt standard if the offense charged is "only a misdemeanor." id.

III. SENTENCING THE PETITIONER TO A TERM OF IMPRISONMENT BASED ON TWO PRIOR CONVICTIONS, THE VALIDITY OR RELIABILITY OF WHICH, WERE NOT PROVEN UNDER ANY PERMISSIBLE STANDARD OF EVIDENCE VIOLATED THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE SIXTH AND FOURTEENTH AMENDMENTS.

Although Georgia does not recognize any misdemeanor sentencing procedure (see Monroe v. State, 250 Ga. 30 (1982)), the Sixth, Eight and Fourteenth Amendments provide the Constitutional framework. The Supreme Court ruled 100 years ago in Ball v. United States, 140 U.S. 118, 11 S. Ct. 761, 766 (1891) that a defendant has the right of allocution and the Ball Court went even further, saying the record must affirmatively show the Defendant's presence and that the defendant was asked to speak in his behalf. In Green v. United States, 365 U.S. 301, 81 S. Ct. 653, 655 (1961), the court held that the record must show the Petitioner was told of his right to present any information (in addition to evidence) in mitigation of punishment. The authorities cited above apply to misdemeanors where imprisonment is a possible sentence. Argersinger v. Hamlin, 407 U.S. 25 (1972); Duncan v. Louisiana, 391 U.S. 145, (1968).

But these cases do not fully define the parameters of a constitutional sentencing procedure. "[F]air administration of justice demands that the sentencing judge will not act on surmise, misinformation and suspicion will impose sentence with hindsight and understanding." United States v. Tucker, 404 U.S. 443 (1972), citing Harris v. United States, 383 U.S. 162, (1968). In Townsend v. Burke, 334 U.S. 736 (1948), supra, the Supreme Court made it clear that a sentence cannot be predicated on false information. "We extend it Townsend v. Burke, but little in holding that a sentence cannot be predicated on information of so little value as that here involved. A rational penal system must have some concern for the probable accuracy of the information

inputs in sentencing process." United States v. Weston, 448 F. 2d 626, 634 (9th Cir. 1971).

Nor is any error cured because the trial judge might contend he would have imposed the same sentence without the tainted information.

> "[O]nce the possibility of reliance on erroneous information of reliance on an invalid conviction has been raised, an unexplained statement of the trial court that it would have imposed the same sentence regardless of the original error is insufficient to dispel the lingering doubt that the sentence was founded upon illegitimate consideration." (emphasis supplied) United States v. Rollerson, 491 F. 2d 1209, 1213 (1st Cir. 1974).

Petitioner submits that the documents submitted into evidence as certified copies of the prior convictions are not in fact certified copies of any public document with the meaning of O.C.G.A. §24-5-20, nor are they certified copies of any convictions within the meaning of O.C.G.A. §17-10-2 and Mathis v. State, 249 Ga. 454, 458 (1982). The first "public record" is simply an entry into a record book. (D-1, 5-1). In fact it is not certified. The clerk's letter itself seeks to certify the conviction with reliance on the entry in the record book. This so called certified copy of the conviction is not signed by a judge, prosecutor or even the defendant, but is signed by a clerk who accepted the "guilty plea." id. The document states Petitioner was not represented by counsel and no waiver of rights was obtained.

The document concerning document the second conviction is at least a certified document. (S-2, D-2). However, it only pertains to the sentencing, not to the convictions. It is not signed by a judge, prosecutor or the defendant. It does not show a whether Petitioner was present or whether a waiver or rights was obtained.

Neither of these documents are certified copies of

any guilty plea or conviction. Where the prior conviction is not properly certified it is not admissible. O.C.G.A. §17-10-2; McVeigh v. State, 205 Ga. 326 (1949). Even where the documents to be construed as certified copies of conviction they do not show representation by counsel or any waiver and therefore it would be necessary for the state to prove the guilty pleas was otherwise voluntary before introducing the document into evidence. Mathis v. State, supra at 458. The State did not meet this burden and in fact the defendant proved the illegality of both guilty pleas. Hooper v. Thompson, 232 Ga. 417, 419 (1974). The Petitioner did not sign an application to enter a guilty plea or a probation order. See Richards v. State, 169 Ga.App. 870 (1984).

Although the State did put into the record a certified copy of the Petitioner's driving record as provided by the Department of Public Safety, this record doesn't serve as a certified copy of a conviction but is only admissible in an habitual violator case. Webster v. State, 170 Ga.App. 102 (1984).

The panel opinion simply ignores the Petitioner's argument as to the proof of the prior convictions stating: "Petitioner contends the records of prior conviction were not properly certified, and this, are not admissible." However, the Petitioner's enumeration of error in this regard was: these "certified copies" were not even evidence of any conviction. Thus the State failed to prove any prior conviction.

Certainly the State must meet some burden of proof before evidence of prior convictions are admissible. McMillan v. Pennsylvania, _____ U.S. _____ 106 S. Ct. 2411 (1986). There the court found no constitutional deficiency in a sentencing procedure which called for the standard of proof to be by a preponderance of the evidence or by clear and

convincing evidence. id. 106 S. Ct. at 2419, 20. However, the evidence presented by the State here simply does not meet any standard of evidence. See Pounds v. State, 126 Ga.App. 852 (1974). The D.U.I. sentencing scheme here performs the same function as the sentencing scheme in McMillan v. Pennsylvania, by raising the minimum sentence that may be imposed. id. 106 S. Ct. at 2417, 18. As the State has not met any burden of proof, much less the standards set out McMillan v. Pennsylvania, reliance on the alleged prior convictions compels reversal of this sentence. The record of the convictions here is simply not lawful evidence in aggravation that may be considered at sentencing.

CONCLUSION

The facts of the case show that Petitioner was sentenced to 90 days in jail and 21 months on probation on the basis of two prior guilty pleas that were:

A) Uncounseled
B) Without any waiver of counsel
C) Were not knowing and voluntary
D) Were not taken in open court or even before a judge or by a judge
E) Were taken without advisement or waiver of any constitutional right
F) Without any factual basis on foundation
G) There was no sworn or signed statement, or acknowledgment of guilt by the Petitioner.

In the interests of preserving our constitutional rights under the Sixth and Fourteenth Amendments, the Petitioner asks this Court to grant certiorari and remand for resentencing.

Respectfully submitted this 27 day of April, 1987.

J.M. Raffauf
Attorney for Petitioner
Office of the Public Defender
805 DeKalb County Courthouse
Decatur, Georgia 30030
Phone: (404) 371-2222

CERTIFICATE OF SERVICE

I certify that I have served the Assistant Solicitor of the Stone Mountain Judicial Circuit with a copy of this Petition upon the Solicitor's Office, by personal service upon Elliott Shoenthal, Assistant Solicitor, 500 DeKalb County Courthouse, Decatur, Georgia 30030.

This 27 day of April, 1987.

J.M. Raffauf
Attorney for Petitioner

APPENDIX A

In the Court of Appeals of Georgia

73386. MOORE v. THE STATE. S-200

SOGNIER, Judge.

Appellant pled guilty to driving under the influence of alcohol and leaving the scene of an accident.

1. Appellant contends the trial court erred by sentencing her to a term of imprisonment because two prior misdemeanor convictions for driving under the influence of alcohol were considered by the trial court in imposing sentence, despite the fact that in both prior convictions, she was not represented by counsel, was not advised of her rights and did not knowingly and voluntarily waive her rights. Appellant testified at a hearing on her motion in limine that in the first instance, she entered a plea of nolo contendere and paid the clerk a $200 fine. On her second conviction she pled guilty and was sentenced

to pay a $600 fine and to perform eighty hours of community work. In neither instance was appellant imprisoned.

In Argersinger v. Hamlin, 4C7 U. S. 25 (92 SC 2006, 32 LE2d 530), the Supreme Court of the United States held that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he is represented by counsel at his trial. This rule was reaffirmed in Scott v. Illinois, 440 U. S. 367 (99 SC 1158, 59 LE2d 383), where the court held that a State trial of an indigent defendant without counsel does not violate the Sixth and Fourteenth Amendments where imprisonment, although authorized, is not imposed upon conviction. Since appellant was not imprisoned as a result of her prior convictions, it was not error for the court to consider appellant's prior convictions in determining an appropriate sentence for her in this case.

Appellant argues, however, that the United States Supreme Court's decision in Baldasar v. Illinois, 446 U. S. 222 (100 SC 1585, 64 LE2d 169), made it impermissible to use a defendant's prior uncounseled misdemeanor conviction to impose an increased term of imprisonment upon a second conviction for the same offense. The Illinois statute considered in Baldasar was held to be an enhanced penalty statute, i.e., it authorized a trial court, upon proof of a prior conviction for the same offense, to

increase substantially the term of confinement it could impose upon a second conviction and convert a second misdemeanor offense into a felony with a sentence to a term in prison. Unlike the Illinois statute, OCGA § 40-6-391 (c) is not an enhanced penalty statute, because it neither increases the maximum confinement authorized nor converts a misdemeanor offense into a felony. Thus, we find that Baldasar is not applicable here, and the prior uncounseled convictions are not constitutionally invalid. See, generally, Stillwell v. State, 161 Ga. App. 230, 232 (288 SE2d 295) (1982); Dotson v. State, 179 Ga. App. 233, 234 (3) (345 SE2d 871) (1986). Accordingly, consideration of appellant's prior convictions for driving under the influence of alcohol in determining an appropriate sentence did not violate the Sixth and Fourteenth Amendments to the constitution of the United States, nor did it violate appellant's right to counsel under the Constitution of Georgia.

2. Appellant contends the records of prior convictions were not properly certified, and thus, were not admissible. At a hearing on appellant's motion in limine the documents were introduced as joint State and defense exhibits, and appellant made no objection to introduction of the exhibits at that time, or at the sentence hearing. Further, appellant voiced no objection to the court's consideration of these documents for

sentencing purposes on the ground that the documents were not properly certified. This court will not consider questions raised for the first time on appeal. Bowen v. State, 173 Ga. App. 361, 362 (4) (326 SE2d 525) (1985).

Judgment affirmed. Birdsong, C. J., and Banke, P. J., concur.

APPENDIX B

Court of Appeals of the State of Georgia

ATLANTA, January 21, 1987

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

73386. Linda S. Moore v. The State (85 C 14459-3)

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

CLERK'S OFFICE, ATLANTA JAN 21 1987

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written. Sophia McClendon

CLERK.

APPENDIX C

CLERK SUPREME COURT
244 WASHINGTON STREET, SW
572 STATE OFFICE ANNEX
ATLANTA, GEORGIA 30334

13

J.M. Raffauf
Office of Public Defender
805 DeKalb County Courthouse
Decatur, GA 30030

GIA

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CLERK'S OFFICE, SUPREME COURT OF GEORGIA
Atlanta FEB 17 1987

Case No. 44333. Moore v. The State

The Supreme Court today denied the writ of certiorari in this case.
All the justices concur, except Gregory, J. dissents

Very truly yours,
JOLINE B. WILLIAMS, Clerk

APPENDIX D

CLERK SUPREME COURT
244 WASHINGTON STREET, SW
572 STATE OFFICE ANNEX
ATLANTA, GEORGIA 30334

George Washington

14

J.M. Raffauf
Office of Public Defender
805 DeKalb County Courthouse
Decatur, GA 30030

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Clerk's Office, Supreme Court of Georgia
ATLANTA MAR 2 1987

The motion for a rehearing was denied today:

Case No. 44333. Moore v The State

Smith + Gregory, JJ, dissent

Yours very truly,
MRS. JOLINE B. WILLIAMS, Clerk

OPPOSITION BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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ORIGINAL

Supreme Court, U.S.
FILED
AUG 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-6914

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED
AUG 15 1987
OFFICE OF THE CLERK
SUPREME COURT, U.S.

LINDA S. MOORE,
Petitioner

VS.

THE STATE OF GEORGIA,
Respondent

BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BARBARA CONROY
ASSISTANT DISTRICT ATTORNEY
DEKALB COUNTY DISTRICT
ATTORNEY'S OFFICE
700 DEKALB COUNTY COURTHOUSE
DECATUR, GEORGIA 30030
(404) 371-2561

Attorney for Respondent

QUESTIONS PRESENTED

(1) Were Petitioner's constitutional rights violated when two prior convictions for that offense were considered by the court in sentencing her for driving under the influence where the two previous convictions were uncounseled and unaccompanied by a waiver of rights, but for which the Petitioner was not imprisoned.

(2) Is O.C.G.A. §40-6-391 an "enhanced penalty statute" as defined by the opinion in Baldasar v. Illinois, 446 U.S. 222 (1980), and, if so, is a sentencing court prohibited from considering previous uncounseled convictions in imposing sentence for a subsequent violation?

(3) Was the evidence of Petitioner's prior convictions so lacking in substance that it's consideration at sentencing violated the Petitioner's constitutional rights?

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No. 86-6914

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LINDA S. MOORE :

Petitioner, :

VS. :

STATE OF GEORGIA, :

Respondent :

PART ONE

STATEMENT OF THE CASE

On July 8, 1985, the Petitioner Linda S. Moore was arrested in DeKalb County, Georgia, and charged with driving under the influence of alcohol, leaving the scene of an accident, driving with a suspended license, giving a false name, and disregarding a traffic control device.

On May 30, 1986, the Petitioner entered a plea of guilty to the offenses of driving under the influence and leaving the scene of an accident in the State Court of DeKalb County. (R-58, 59). The Petitioner was sentenced to serve a period of three (3) months in the DeKalb County jail, twenty-one (21) months on probation, a fine of one thousand dollars ($1000.00), and fifty dollars ($50.00) in court costs. In addition she was ordered to obtain a medical evaluation for alcohol dependency and received a suspension of her driving privileges for twenty-four (24) months. (R-58).

Prior to her May 30, 1986 plea, Petitioner filed a Motion in Limine. (R-8). This motion sought to prohibit the court from reviewing the Petitioner's driving record during the sentencing stage of the plea. Petitioner argued that her prior pleas to driving under the influence were invalid under the Sixth and Fourteenth Amendments of the

United States Constitution, and Article I, Section I, Paragraph 14 of the 1983 Constitution of Georgia (R-8, 55).

The Motion in Limine was heard by the court on March 28, 1986. The State presented evidence of the Petitioner's driving history, by submitting a driver's history prepared by the Department of Public Safety, and certified by the Department's Custodian of Records as a true and correct copy of the original (S-3). This certified driver's history indicated that the Petitioner had several prior traffic violations, including two prior convictions for DUI. (S-3).

In addition, the State produced a certified copy of the docket book kept by the City Clerk of Oxford County, Georgia reflecting the disposition of the Petitioner's June, 1982 DUI plea. (D-1, S-1). In that case, the Petitioner was permitted to plead nolo contendere, pay a two hundred dollar ($200.00) fine plus costs, and to serve thirty (30) days of hard labor on the streets, suspended upon payment of the fine. The record indicates that the Petitioner had called the Clerk's Office in advance to determine the amount of the fine, (M-14) and that she paid the fine in cash (M-12).

The State also provided further evidence of the Petitioner's driving history by producing a certified copy of a Uniform Traffic Citation issued by the Rockdale County, Georgia, Sheriff's Department. (R-65) (S-2) (D-2). This citation indicates that on March 7, 1985 she pled guilty to DUI, and was sentenced to a fine of six hundred ($600.00) dollars, plus eighty (80) hours of community service. (D-2, S-2). The Petitioner testified at the motion hearing that she understood she was pleading guilty (M-17).

The record indicates that although she was not represented by counsel in either plea, Petitioner understood she was pleading guilty, and she was never required to serve any time in custody for either DUI offense.

After hearing evidence presented by both the parties, the court denied the Motion in Limine on May 19, 1986.

The judgment of the trial court was affirmed by the Georgia Court of Appeals in Moore v. State, 180 Ga. App. 746 (1987) [Petitioner's Appendix A]. The Supreme Court of Georgia denied the Petitioner's Writ of Certiorari. (Petitioner's Appendix C).

PART TWO

RESPONSE TO PETITIONER'S ARGUMENTS

A

THE PETITIONER'S PRIOR CONVICTIONS FOR DRIVING UNDER THE INFLUENCE WERE NOT CONSTITUTIONALLY INVALID AND THE TRIAL COURT DID NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF THE PETITIONER IN CONSIDERING THOSE CONVICTIONS WHEN PASSING SENTENCE.

The Petitioner's first argument is that her prior convictions for DUI, which were uncounseled and obtained without a waiver of other constitutional rights, were improperly considered when she was sentenced in DeKalb State Court. Petitioner relies primarily on Boykin v. Alabama, 395 U.S. 238 (1969) as authority for her position.

In Boykin, the Supreme Court was faced with a defendant who, with the advice of counsel, entered guilty pleas to five (5) counts of armed robbery. As provided by Alabama law at that time, a sentencing trial was held and the defendant was sentenced to die on each count. The Supreme Court found that the trial judge's failure to determine whether the defendant understood the consequences of his pleas amounted to a violation of his constitutional rights. Specifically, the Court held that a defendant must understand what he is charged with, that he has a right to

trial by jury, a right to confront witnesses, a privilege against self incrimination, and that by entering a plea, he is waiving those rights.

It is important to consider where and how the right to counsel fits within the rights enumerated in Boykin. That an indigent defendant has the right to counsel in a capital case had been decided long before in Powell v. Alabama, 287 U.S. 45 (1932). In Gideon v. Wainwright, 372 U.S. 335 (1962), the Court agreed that an indigent in a non-capital felony case also had a constitutional right to a Court appointed attorney. The right to counsel has been held to be a "fundamental" right. Grosjeans v. American Press Co., 297 U.S. 233, at 243, 244, (1936)

The question of whether this fundamental right applies in misdemeanor prosecutions was answered in Argersinger v. Hamlin, 407 U.S. 25, (1972), where the Court held that an indigent defendant could not be sentenced to a term of imprisonment unless he had been afforded the right to appointed counsel. In Scott v. Illinois, 440 U.S. 367, (1979), the Court reaffirmed its use of an "actual deprivation of liberty" as the guide-line when reviewing an uncounseled misdemeanor plea. The Court held that the "central premise of Argersinger, that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment is eminently sound and warrants the adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." Id. Scott at 373. Justice Rehnquist's opinion indicates that the Scott Court was aware of the importance of maintaining actual imprisonment as the guideline for the appointment of counsel. "Argersinger has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse states" Id. at 373.

It is clear, in view of the decisions in Argersinger and Scott, that the Petitioner's prior DUI convictions are not constitutionally invalid because she was not afforded the right to counsel. The Petitioner was never incarcerated as a result of any prior DUI conviction. The penalties imposed upon the Petitioner for these misdemeanor violations consisted solely of fines, court costs, eighty (80) hours of community service, and a suspension of her driver's license for one hundred and twenty (120) days. (S-1, D-1) (S-2, D-2) (M-12, M-13, M-15). The clear mandate of Argersinger and Scott can lead only to the conclusion that when viewed individually, the Petitioner's prior DUI convictions are not invalid due to the absence of counsel.

This poses the question of whether the Boykin rights should be treated in a similar manner. The Petitioner argues that the inability of the State to prove a knowing and intelligent waiver of these rights makes any conviction invalid. In essence, Petitioner argues that the "important Federal rights" (Boykin, at 243) are more important than the fundamental right to counsel, and the State should be held to a higher burden.

Such a requirement would be inconsistent and illogical. If a conviction is valid under Argersinger and Scott, it is not made invalid by the absence of a waiver of the Boykin rights. The Boykin rights are not fundamental rights nor are they more important than the right to counsel. Moreover, as Justice Rehnquist stated in Scott "...any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse states" Scott at 373. Boykin should not be expanded. The Petitioner's previous convictions for DUI are not constitutionally deficient and her first reason for granting the Writ is, therefore, without merit.

B

SECTION 40-6-391 OF THE OFFICIAL CODE OF GEORGIA IS NOT AN ENHANCED PENALTY STATUTE AND THE TRIAL COURT DID NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF THE PETITIONER IN CONSIDERING HER PREVIOUS CONVICTIONS IN PASSING SENTENCE.

Petitioner's second argument, that she is entitled to a Writ, is unsound because her interpretation of Baldasar v. Illinois, 446 U.S. 222 (1980) is flawed. The Court was presented with the question of whether a constitionally valid uncounseled misdemeanor conviction "may be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term." Id. at 222.

In Baldasar there was no single opinion in which a majority of the justices concurred, so the holding of the Court must be the position taken by the justices who join in the result on narrowest grounds. Marks v. United States, 430 U.S. 188 (1977). "Thus the holding in Baldasar is Justice Blackmun's rationale that an invalid uncounseled conviction cannot be used to enhance a subsequent conviction." Santillanes v. United States Parole Commission, 754 F.2d 887 (1985). (emphasis added). O.C.G.A. §40-6-391 is not an enhanced penalty statute. It is a minimum mandatory sentence statute. Even if it were an enhanced penalty statute, Petitioner's prior convictions, while uncounseled were not invalid convictions. Quite the contrary, all of the requirements of Argersinger supra and Scott supra were met.

Even if one were to consider Justice Stewart's concurring opinion as the most narrow, the holding of Baldasar would be that an indigent defendant cannot be "sentenced to an increased term of imprisonment only because he had been convicted in a previous prosecution in which he had not had the assistance of appointed counsel in his

defense." Baldasar, at 224.(emphasis in original) The Petitioner was not sentenced to an increased term of imprisonment only because of her prior convictions. O.C.G.A. §40-6-391(c) prescribes mandatory minimum sentences, and the maximum penalty remains constant, that of a misdemeanor punishable by up to twelve (12) months incarceration and a one thousand dollar ($1000.00) fine. At no point is the maximum punishment increased, nor is it elevated to that of a felony as was the case in Baldasar. Furthermore, imprisonment is never mandated by the law, regardless of the number of prior convictions offered in aggravation at sentencing. "The judge, at his sole discretion, may suspend, stay, or probate the minimum ten-day term of imprisonment...provided that a condition of the suspension, stay, or probation of the minimum ten-day term of imprisonment shall be that the defendant shall perform not less than thirty (30) days of community service." O.C.G.A §40-6-391(c)(3)(B)(ii). This simply is not an "enhanced penalty statute" as defined by Baldasar.

In view of the foregoing, even if one accepts Justice Marshall's opinion as the holding of Baldasar (as Petitioner appears to do), the Petitioner is still wrong in her position that the trial court was prohibited from reviewing her record when sentencing her. In Georgia, DUI is always a misdemeanor, and a judge is never required to impose imprisonment. Baldasar is not applicable.

C

THE EVIDENCE PRESENTED TO THE TRIAL COURT WAS ADEQUATE TO PROVE HER PRIOR CONVICTIONS AND ITS CONSIDERATION AT SENTENCING DID NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF THE PETITIONER.

In her third reason for granting the writ, the Petitioner urges that the evidence of prior convictions

considered by the Court was so lacking in substance that its use violated the constitutional rights of due process and equal protection. Her arguments here also fail.

The trial court properly admitted evidence of the Petitioner's prior criminal history during sentencing. The State presented a certified copy of the docket book page which reflected the disposition of the Petitioner's 1982 DUI. (S-1, S-2). The authenticity of this document was supported by a letter received from the Clerk of the City of Oxford, Georgia (S-1, D-1). This letter contains the Petitioner's full name, the date of her plea, the disposition, and a corresponding case number (2455). "The Clerk of Court may certify a copy or transcript of the court record..." Thompson v. Cheatham, 249 Ga. 120 (1979). The reliability of the docket is further supported by the testimony of the Petitioner who stated that "I had a two hundred dollar ($200.00) fine" (M-12), "and that I just pleaded nolo" (M-13).

The Petitioner further attacks the reliability of State's Exhibit 2 (S-2, D-2), though she concedes that this exhibit is a properly certified document. The citation contains her full name and the charges against her. The back of the citation reflects the disposition of the case and is signed by the Clerk of the Court, Ms. Reba Steinmetz (S-2, D-2) (M-5). The reliability of this document is supported by the Petitioner's statements that "a lady told me that the fine was six hundred dollars ($600.00). I had to do eighty (80) hours of community service and they took my license for one hundred twenty (120) days" (M-15). This sentence is reflected on the certified traffic citation. In addition the Petitioner testified that when she paid the fine she knew that she was pleading guilty to the charge of DUI (M-16).

> The O.C.G.A. §40-5-2(e) states that:
> The commissioner shall designate members of the department to be the official custodians of the records of the department. The custodians may certify copies or compilations, including extracts thereof, of the records of the department. When so certified, such records shall be admissible as evidence in any civil or criminal proceeding as proof of the contents thereof.

Pursuant to this code section, the state presented the trial court with a certified copy of the Petitioner's driving history (S-3, D-3). This driving history reflects the Petitioner's name, address, date of birth, and driver's license number (S-3, D-3). The Petitioner has never contended that this document does not accurately reflect her Georgia driving history.

In Love v. Hardison, 166 Ga. App. 677, (1983), the Court of Appeals held that the admission of a certified copy of a Department of Public Safety computer print-out showing prior convictions was proper under the O.C.G.A. §40-5-2(e). The court noted that, as in the instant case, the Appellant had the ability to show that the print-out was untrustworthy. And as in the case at bar, no evidence was submitted to show that the print-out was not accurate.

The documentary evidence admitted by the trial court was properly certified and accurately reflected the Petitioner's prior convictions for DUI. The objections raised by the Petitioner had to do with the trial court's consideration of the record, not the State's method of proof. In fact, the Petitioner joined with the State in submitting the exhibits she now complains of.

The exhibits correctly reflected the Petitioner's driving history. That history was otherwise admissible and the admission into evidence of the exhibits did not violate The Sixth or the Fourteenth Amendments. Thus the Petitioner's third basis for relief is also without merit.

CONCLUSION

For the foregoing reasons, the Respondent asks that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

Barbara Conroy
Assistant District Attorney
Stone Mountain Judicial
Circuit of Georgia

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LINDA S. MOORE,	:
Petitioner	:
VS.	:
THE STATE OF GEORGIA,	:
Respondent	:

CERTIFICATE OF SERVICE

I, BARBARA CONROY, Assistant District Attorney, do hereby certify that I have served opposing counsel with a copy of Respondent's Response to Petitioner's Application for a Writ of Certiorari by depositing same in a properly addressed envelope with first class postage to:

J. M. Raffauf
Attorney at Law
Office of the Public Defender
805 DeKalb County Courthouse
Decatur, Georgia 30030

This 13th day of August, 1987.

Barbara Conroy
Assistant District Attorney

No. 86-6914

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

LINDA S. MOORE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF GEORGIA

MAILING STATEMENT

I, Barbara Conroy, duly admitted to the bar of the Supreme Court of the United States on the 10th day of March, 1986, hereby certify that on the 13th day of August, 1987, and within the time allowed by the Court, I deposited the enclosed Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeals of Georgia in a United States Post Office with First Class Postage prepaid, addressed to: Joseph F. Spaniol, Jr., Clerk, United States Supreme Court, Washington, D.C., 20543.

This 13th day of August, 1987.

Barbara Conroy

Barbara Conroy
Assistant District Attorney
Ga. Bar No. 142932

Sworn to and subscribed before me
this the 13th day of August, 1987.

Notary Public

Notary Public, Dekalb County, Georgia
My Commission Expires June 5, 1990

OPINION

SUPREME COURT OF THE UNITED STATES

LINDA S. MOORE *v.* GEORGIA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

No. 86-6914. Decided October 13, 1987

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

In *Scott* v. *Illinois*, 440 U. S. 367 (1979), this Court held that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not incarcerated. The following Term, however, in *Baldasar* v. *Illinois*, 446 U. S. 222 (1980) *(per curiam)*, this Court held that such a conviction may not be used under an enhanced penalty statute to convert a subsequent misdemeanor conviction into a felony with a prison term.

Here, petitioner was convicted and sentenced to a prison term under Ga. Code Ann. § 40-6-391(3) which imposes a mandatory minimum sentence on a person convicted of driving under the influence of alcohol, where such person has at least two prior convictions for the same offense. Petitioner argued that *Baldasar* prohibited her conviction under § 40-6-391(3), because this conviction relied upon her two prior, uncounseled convictions for driving under the influence. The Court of Appeals of Georgia rejected this contention, and determined that *Baldasar* was inapplicable here because § 40-6-391(3) merely imposes a *minimum* prison term based on petitioner's prior convictions, and does not "increase[] the *maximum* confinement authorized [or] convert[] a misdemeanor offense into a felony." App. to Pet. for Cert. 3 (emphasis added).

Possibly because this Court was sharply divided in *Baldasar*, with no opinion for reversal gaining more than three votes, courts attempting to apply that decision have

come to different conclusions concerning its meaning. See *Schindler* v. *Clerk of Circuit Court*, 715 F. 2d 341, 344 (CA7 1983), cert. denied, 465 U. S. 1068 (1984) ("In light of . . . the failure of the *Baldasar* majority to agree upon a rationale for its result, the scope of the decision remains unclear."). Some courts have applied *Baldasar* as the Georgia court did here, and have allowed the use of prior, uncounseled convictions in cases quite similar to this one. *E. g.*, *Commonwealth* v. *Thomas*, 510 Pa. 106, 112–114, 507 A. 2d 57, 60–61 (1986); *State* v. *Orr*, 375 N. W. 2d 171, 175–176 (N. D. 1985). Others, however, have read *Baldasar* more broadly, and have disallowed the use of prior, uncounseled convictions in prosecutions akin to petitioner's. *E. g.*, *State* v. *Oehm*, 9 Kan. App. 2d 399, ——, 680 P. 2d 309, 311–312 (1984); *State* v. *Dowd*, 478 A. 2d 671, 677–678 (Me. 1984).

Because the confusion over *Baldasar*'s holding has led to uneven application of that case and conflicting decisions in the courts below, I would grant certiorari here to answer the outstanding questions concerning *Baldasar*'s scope and proper application.